STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVERETTE MOSHI TAYLOR,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 215245
Kent Circuit Court
LC No. 98-002949-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to consecutive terms of twenty-five to fifty years of imprisonment for the second-degree murder conviction and the mandatory two years of imprisonment for the felony-firearm conviction. He appeals as of right and we affirm.

This case arises out of the shooting death of Elijah McGee during the morning of February 12, 1998. Edna Merriweather, the key prosecution witness, testified that she met defendant in a gas station and asked him if he had any drugs he could give her. Defendant told her that he could sell her some drugs and they exited the gas station. Walker and Merriweather got into a car, also with Merriweather's brother-in-law, Kenny Walker, while defendant walked to another car. Merriweather then heard gunshots and saw defendant with a gun shooting at a car that was speeding away. Defendant returned to the car with Walker and Merriweather, sold Merriweather some drugs, and drove them home.

Walker similarly testified that he and Merriweather were looking to purchase drugs, and that when they arrived at the gas station, Merriweather motioned for defendant to enter. Walker remained in a taxi cab while Merriweather and defendant entered the gas station. When defendant and Merriweather exited, he joined them in another car. Walker stated that defendant was with another man (Steven Hall) and they approached the car. Walker heard about four gunshots, Hall then ran off, and defendant entered the car with Walker and Merriweather. Walker did not see either Hall or defendant with a gun. Hall acknowledged being with defendant and at trial testified that defendant fired

the gun at the car. During his police statement, however, Hall told police that defendant did not fire a gun because Hall feared for his life.

Defendant was later arrested in March 1998, and charged with open murder and felony-firearm. The jury convicted him of second-degree murder and felony-firearm. On appeal, defendant raises three issues. He argues that the trial court erred in denying his motion to suppress the evidence of the gun found by the police because the search warrant was not properly supported by probable cause. He also argues that the trial court abused its discretion in ruling that the prosecutor could question defendant about his prior charge of assault with intent to commit murder and his similar defense. Lastly, defendant argues that the trial court abused its discretion in admitting hearsay evidence of a gun box and corresponding paperwork from the gun manufacturer indicating that these items accompanied nine-millimeter guns. We do not find any issue to require reversal, and affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the evidence of a nine-millimeter gun found by the police pursuant to a search warrant at defendant's residence. Defendant contends that the search warrant was not supported by probable cause and that the warrant was stale. We review de novo the trial court's ultimate decision regarding a motion to suppress, while the trial court's factual findings are subject to the clearly erroneous standard of review. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

Here, Grand Rapids Police Officer Philip Betz requested a search warrant on March 5, 1998, twenty-one days after McGee's murder, for defendant's residence. Betz's affidavit in support of the search warrant stated the address of the residence and that Betz obtained the address from information given by defendant to Michigan State Police when he was arrested on a prior charge. Betz specifically averred:

> Your affiant is a police officer with the Grand Rapids Police Department, currently assigned to the Major Case Team.
>
> On February 12, 1998 your affiant was one of two detectives assigned to investigate the homicide of Elijah McGee. Elijah McGee was murdered on February 12, 1998 at approximately 6:30 a.m. while operating his motor vehicle on Geneva Avenue, SE, just south of Franklin Street, in the City of Grand Rapids, County of Kent, State of Michigan. Evidence indicates McGee was shot one time with a 9 mm bullet. In addition, evidence at the crime scene indicates four shots were fired at Mr. McGee. Your affiant's investigation uncovered a witness who identified the defendant, Everette Moshi Taylor, as having fired a handgun into Mr. McGee's vehicle. On March 4, 1998 your affiant's investigation culminated in the issuance of a warrant for Open Murder, Felony Firearm against the defendant, Everette Moshi Taylor, for the murder of Elijah McGee. Said warrant was authorized by [a] magistrate . . . on or about March 4, 1998. At approximately 12:30 a.m. on March 5, 1998 defendant was arrested on said warrant.
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> * * *

> Your affiant [has] been a police officer for 22 years and a detective for 13 years. This experience has taught your affiant that firearms, even those firearms used in illegal activities, are often retained by those individuals involved in said illegal activities.

Based on this affidavit, the magistrate issued a search warrant on March 5, 1998.

A search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. *People v Whitfield*, 461 Mich 441, 446; ___ NW2d ___ (2000); *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995); *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Appellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard. *Russo, supra*, p 603. Rather, the reviewing court is to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Id.* Thus, the reviewing court is to ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*, p 604. Further, the reviewing court is to consider only those facts that were presented to the magistrate and ensure that the magistrate's decision was based on actual facts, not on the conclusion of the affiant. *Sloan, supra*, pp 168-169.

We find that the facts averred in the affidavit were sufficient to establish probable cause to issue the search warrant. Specifically, the police officer stated that he had personally investigated the homicide and that he had uncovered a witness who identified defendant as having fired a handgun into the victim's car. Additionally, the officer's statement that firearms used in illegal activities are often retained by those involved in the illegal activities is not a mere conclusory statement, but based on the officer's personal experience of twenty-two years as a police officer and thirteen years as a detective. Since the affidavit need not prove anything, *Whitfield, supra*, p 445, and in considering the facts set forth in the affidavit in a common-sense and realistic manner, we conclude that the magistrate had a substantial basis to conclude that there existed a fair probability that the handgun would be found at defendant's residence.

With respect to the staleness argument, the crime occurred on February 12, 1998, and the affidavit was sworn on March 5, 1998. As stated in *Russo, supra*, p 605, staleness is not a separate doctrine in probable cause to search analysis as probable cause to search is concerned with whether certain identifiable objects are probably to be found at the present time in a certain place. Thus, time is one factor to be weighed in light of the other factors involved. *Id.* In the present case, the thing sought was a handgun, a nonperishable item, in a place of residence by a person with a known propensity to commit crimes. Further, probable cause requires only the probability of criminal activity. *Id.*, pp 606-607. Therefore, based on the police officer's statement that in his experience firearms used in illegal activities are often retained by those individuals involved in that activity, and based on the totality of the circumstances, we find that the magistrate had a substantial basis on which to conclude that there was a fair probability that the handgun would be found at defendant's residence.

Accordingly, the trial court did not err in denying defendant's motion to suppress the evidence of the gun because the search warrant was adequately supported by probable cause.

Defendant next argues that the trial court abused its discretion in ruling that the prosecutor could question defendant concerning his prior charge and defense.

During trial, the prosecutor moved to present evidence of defendant's prior charge if defendant testified at trial. Apparently, defendant was charged (but acquitted) in the shooting of another person also at a gas station and proffered the same defense as in the present case, namely, that he was merely present at the time of the shooting, but did not participate in the shooting. In the present case, defendant had maintained throughout that he was not present at the scene of the shooting. In fact, defendant had filed an alibi defense before trial. It was not until opening argument that defense counsel stated that defendant was indeed present at the scene of the crime, and maintained that defendant did not participate in the crime. Defense counsel did not proffer an alibi defense at trial.

Because of this change in defense strategies, the prosecutor stated his intention to cross-examine defendant regarding his prior charge (where the same defense was proffered) to impeach defendant's credibility. The trial court ruled that it would permit the prosecutor to cross-examine defendant in this regard because the proposed evidence was relevant to defendant's credibility. Defendant did not testify at trial and now contends that he did not do so because of the trial court's ruling. Because defendant did not testify, the circumstances surrounding the prior charge were never introduced at trial.

Contrary to defendant's assertion, the prosecutor did not attempt to offer the evidence under MRE 404(b) (evidence of other crimes, wrongs, or acts) and the trial court specifically stated that the evidence could only be introduced if defendant testified and could only be used for impeachment purposes. See MRE 608(b). Because defendant did not testify at trial, and the evidence of the prior charge was ultimately never introduced, this issue is not preserved for appellate review. *People v Finley*, 431 Mich 506, 521; 431 NW2d 19 (1988), following *Luce v United States*, 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984). Moreover, the Court in *Finley*, *supra*, p 513, specifically rejected the argument that a defendant is denied a defense by not testifying based on the court's decision to permit such impeachment testimony and stated that a reviewing court cannot assume that a defendant decided not to testify out of fear of impeachment by a prior conviction.

Accordingly, because defendant did not testify at trial and evidence of his prior charge was consequently never introduced, the issue is not preserved for appellate review.

Lastly, defendant argues that evidence of a gun box and paperwork from the manufacturer of the gun was improperly admitted. Defendant argues that the trial court erred in admitting this evidence under MRE 803(24) (other exceptions). A trial court's determination of an evidentiary issue is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

On the third day of this ten-day trial, the prosecutor moved to introduce a gun box and corresponding paperwork from Lorcin Engineering, a gun manufacturer. The gun box and paperwork had been obtained by Grand Rapids Police Officer Thomas Doyle, along with a letter sent by facsimile, indicating that the box was a sample of the boxes in which Lorcin shipped its nine-millimeter handguns. Doyle initially requested this information from Lorcin after ballistic reports showed that a Lorcin L nine-

millimeter handgun was likely used to fire the nine-millimeter slug found in the victim. The trial court ultimately ruled that the gun box, the paperwork, and the letter could all be introduced as evidence. Doyle testified at trial that the paperwork sent looked the same as that which was found in the gun box found during the search of defendant's residence and Doyle demonstrated how the gun box he ordered fit onto the gun box bottom found at defendant's residence. This evidence was important because no gun was found at defendant's residence; however, the gun box part and paperwork were consistent with the gun that could have fired the fatal shots at the victim.

MRE 803(24) provides that the following is not excluded by the hearsay rule, even if the declarant is not available as a witness:

> *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

We affirm the trial court's ruling, but for different reasons. First, the gun box is not hearsay evidence. The gun box was demonstrative evidence; it was not a *statement* (an oral or written assertion or nonverbal conduct of a person), other than the one made by the declarant while testifying, offered into evidence to prove the truth of the matter asserted. MRE 801(a), (c). Further, the paperwork is also not hearsay because it was not offered into evidence to prove the truth of the matter asserted. MRE 801(c). Rather, the paperwork was introduced as being similar to that found at defendant's residence, thus tying the nine-millimeter gun manufactured by Lorcin to the same materials found at defendant's residence and probably used to kill the victim.

With respect to the letter sent by facsimile, it simply explained that Lorcin would send a gun box and paperwork used in its shipping of its nine-millimeter handguns. Even if the letter was not properly admitted under MRE 803(24) because the prosecutor did not inform defendant of any intention to introduce the letter sufficiently in advance of trial, and there is no other exception to admit the letter, the admission of the letter was harmless error. That is, the admission of the letter was not prejudicial such that the error undermined the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). In assessing the untainted evidence in this case, it is certainly not more probable that a different outcome would have resulted had the letter not been introduced. *Id.* Even without an explanatory letter, the jury could consider the similarity of the gun boxes and brochures and the fact that nine-millimeter bullet casings were found at the scene of the shooting. Additionally, there was eyewitness testimony that defendant was the shooter. More than one witness placed defendant as being

at the victim's car at the time of the shooting. Under these circumstances, we conclude that any error in admitting the letter was harmless.

We conclude that the trial court did not abuse its discretion in admitting the gun box, the corresponding paperwork, and the letter.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins